819

NON-CHARTER CITY—WITHOUT AUTHORITY TO MERGE POLICE AND FIRE DEPARTMENTS INTO COMMON UNIT PERFORMING DUTIES OF BOTH. §§737.05, 737.09, R.C.

SYLLABUS:

A non-charter city is without authority, under the constitution and laws of Ohio, to merge the police and fire departments into a common unit performing the duties of both, and such departments are subject to the provisions of Sections 737.05 to 737.09, inclusive, Revised Code; nor can a practical merger of such departments be accomplished by indirection by failing to establish a fire department and by assigning purely fire protection duties to members of the police department.

Columbus, Ohio, September 14, 1959

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"An inquiry has been directed to this office by the Secretary of the Police Relief and Pension Fund of a non-charter city. I enclose for your reference copies of correspondence relative to this inquiry. The question posed is whether a police officer who is required by city ordinance to respond to fire alarms, attend practice sessions for firemen and perform duties of firemen would be entitled to benefits of the Police Relief and Pension Fund in the event of his injury or death while engaged in such activity.

"The facts presented in the enclosed correspondence indicate that the city has passed an ordinance requiring members of the

Police Department to answer fire calls for the safety and protection of the citizens and to perform other duties to be designated by the Chief of Police. Special orders issued under this ordinance within the Police Department required police officers to attend fire classes, answer fire calls at any time of the day or night and perform duties of firemen, as designated by their superiors. Such duties are to be performed without remuneration in addition to the regular salary prescribed for police officers. The Fire Department of the city is a volunteer group, and no member of the Police Department is an active member of the group.

"Various sections of the Revised Code purport to establish legal limits within which a municipality can establish separate police and fire departments. Opinion of the Attorney General, No. 900, rendered November 7, 1951, discusses these statutes in reaching the conclusion stated in paragraph 1 of the syllabus, as follows:

> '1. A municipal corporation under the Constitution and laws of Ohio does not have the authority to merge the police and fire departments into a common unit performing the duties of both.'

"In this opinion the then Attorney General relied upon portions of opinions of the Ohio Supreme Court which are summarized in paragraphs 3 and 4 of Cincinnati v. Gamble, 138 O.S. 220, and paragraphs 1, 4 and 5 of the syllabus of State, ex rel. Arey, v. Sherrill, 142 O.S. 574, as well as excerpts taken from the context of the Court's opinion in each case.

"In State, ex rel., Canada, v. Phillips, 168 O.S. 191, decided July 9, 1958, the Supreme Court held, as stated in paragraph 7 and 8 of the syllabus, as follows:

> '7. Where a municipality establishes and operates a police department, it may do so as an exercise of the powers of local self-government conferred upon it by Sections 3 and 7 of Article XVIII of the Constitution; and if it does, the mere interest or concern of the state, which may justify the state in providing similar police protection, will not justify the state's interference with such exercise by a municipality of its powers of local self-government.
>
> '8. * * *. City of Cincinnati v. Gamble et al., Board of Trustees, 138 Ohio St., 220, distinguished, paragraph three of its syllabus questioned and paragraph four of its syllabus overruled. * * * paragraphs four, five and six of the syllabus of and State, ex rel. Arey, v. Sherrill, City Mgr., 142 Ohio St., 574, overruled.'

"The opinion in this case states, with reference to the Gamble and Arey cases, as follows:

'As to City of Cincinnati v. Gamble, supra (138 O.S. 220), we have some question as to the soundness of part of paragraph three of the syllabus and must necessarily overrule paragraph four thereof. As to the decision, we believe it is reasonably arguable that it can be supported on grounds other than those inconsistent with the decisions and pronouncements of law which we are following in the instant case, but, since no question with respect to the decision in the Gamble case is necessarily presented for our consideration, we express no opinion thereon.

"* * *

'We cannot reconcile * * * paragraphs four, five and six of the syllabus and the decision in State, ex rel. Arey, v. Sherrill, supra (142 O.S. 574), with the pronouncements of law and decisions being followed in rendering the decision in the instant case. Hence, we believe they should be overruled.'

"In order to answer the question now presented to this office as stated above it is necessary to reconsider questions which are essentially the same four questions answered in the 1951 Opinion cited above, in view of State, ex rel., Canada, v. Phillips, supra. On the facts of the instant case those questions can be rephrased for your consideration here, as follows:

'1. Does a municipal corporation have the power to adopt an ordinance merging the police and fire departments into a single common unit charged with the duty of performing the functions of both?

'2. Can the members of a municipal police department legally be required to perform both police and fire protection services?

'3. How shall the statutory provisions governing pensions for municipal police officers and firemen be applied where an individual employee is required to serve in the capacity of both police officer and fireman?

'4. How shall the tax provided under Sections 741.09 and 741.40, of the Revised Code, for the payment of benefits and pensions be levied and distributed where the police and fire departments are merged into a single department which performs the duties of both?' "

Your question deals with a "non-charter" city and will be answered in that light.

There can be no doubt that the Constitution of the State of Ohio provides local self-government to the municipalities of this state. This

so-called "home rule" power is granted and limited by Section 3 of Article XVIII, Ohio Constitution, which reads:

> "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. (Adopted September 3, 1912.)"

What was modified by the phrase "as are not in conflict with general laws" has been the source of considerable controversy. The most recent Supreme Court holding on this point is found in the case of *The State, ex rel. Canada* v. *Phillips,* 168 Ohio St., 191, paragraph 4 of the syllabus reading:

> "4. The words, 'as are not in conflict with general laws' found in Section 3 of Article XVIII of the Constitution, modify the words 'local police, sanitary and other similar regulations' but do not modify the words 'powers of local self-government.' "

Clearly then, if the operation of a municipal police or fire department is a "police, sanitary or other similar regulation," the municipality would have to yield to the authority of the state when its ordinance was in conflict with state law. Until the *State, ex rel. Canada* v. *Phillips* case, *supra,* was decided, the law seemed clear that the operation of police and fire departments by municipalities were matters of state-wide concern and the state law governed. The above cited case, however, has reversed that position.

Paragraphs 5 and 7 of the syllabus of *State, ex rel. Canada v. Phillips, supra,* read as follows:

> "5. The mere fact that the exercise of a power of local self-government may happen to relate to the police department does not make it a police regulation within the meaning of the words 'police-regulations' found in Section 3 of Article XVIII of the Constitution.
>
> "* * *
>
> "7. Where a municipality establishes and operates a police department, it may do so as an exercise of the powers of local self-government conferred upon it by Sections 3 and 7 of Article XVIII of the Constitution; and, if it does, the mere interest or concern of the state, which may justify the state in providing similar police protection, will not justify the state's interference with such exercise by a municipality of its powers of local self-government."

In paragraph 8 of the syllabus of *State, ex rel. Canada* v. *Phillips,* the courts specifically overruled paragraph 4 of the syllabus of *City of Cincinnati* v. *Gamble, et al., Board of Trustees,* 138 Ohio St., 220, which reads:

> "4. In general, matters relating to police and fire protection are of state-wide concern and under the control of state sovereignty."

The court also, in paragraph 8 of the syllabus of *State, ex rel. Canada* v. *Phillips,* overruled the syllabus of *State, ex rel, Daly* v. *City of Toledo,* 142 Ohio St., 123 and paragraph 4, 5, and 6 of the syllabus of *State, ex rel. Arey v. Sherrill, City Mgr.,* 142 Ohio St., 574.

The syllabus of *State, ex rel. Daly* v. *City of Toledo, supra,* reads as follows:

> "1. Matters relating to fire protection are of state-wide concern and are under the control of state sovereignty. (City of Cincinnati v. Gamble et al., Trustees, 138 Ohio St., 220, approved and followed.)
>
> "2. Members of a municipal fire department in the classified civil service are entitled to the full protection and benefit of the state civil service laws.
>
> "3. The General Assembly having provided by Section 486-17a, General Code, that the tenure of office of every officer and employee in the classified service of the state, counties, cities and city school districts shall be during good behavior and efficient service, a municipal ordinance requiring retirement of persons in such classified service at the age of sixty-five years is invalid and unenforceable."

Paragraphs 4, 5, and 6 of the syllabus of *State, ex rel. Arey* v. *Sherrill, City Manager,* supra, read as follows:

> "4. In general, matters relating to the members of a police department are of state-wide concern and are under the control of state sovereignty. (City of Cincinnati v. Gamble et al., Bd. of Trustees, 138 Ohio St., 220, approved and followed.)
>
> "5. The acts passed by the General Assembly which provide that in each city there shall be a department of public safety administered by a director of public safety who shall have all powers and duties connected with and incidental to the appointment, regulation and government of the police department, and the power to inquire into the cause of suspension of any police

officer and to render judgment thereon, are 'general laws' within the meaning of Section 3, Article XVIII of the Constitution.

"6. Where a charter of a municipality and an administrative code enacted under authority thereof grant to a municipal officer, called a city manager, power to appoint, dismiss, suspend and discipline all officers in the administrative service (which service includes members of the police department), such provisions in the charter and administrative code cannot prevail as against the provisions of the General Code; and a police officer, suspended for the claimed violation of certain rules of the police department, has a right to insist that the director of public safety inquire into the cause of such suspension and render judgment thereon regardless of such provision in the city charter or administrative code."

From *State, ex rel. Canada* v. *Phillips, supra,* it is clear that matters relating to operation of municipal police and fire departments are "local" matters and come within the power of local self-government under Section 3, Article XVIII, Ohio Constitution. The next question to be determined is in what manner this power may be exercised by a municipality?

Sections 2 and 7, Article XVIII, Ohio Constitution, provide as follows:

"2. 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. (Adopted September 3, 1912.)

"* * *

"7. 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." (Adopted September 3, 1912.)

While it has been held that municipalities need not establish a charter in accordance with Section 7, Article XVIII of the Ohio Constitution to be vested with the substantive home rule powers of Section 3, Article XVIII of the Ohio Constitution (see *The Village of Perrysburg, et al.* v. *Ridgway, a taxpayer,* et al., 108 Ohio St., 245) a non-charter city remains subject to the statutory provisions passed pursuant to Section 2, Article

XVIII of the Ohio Constitution for the method to be used in exercising its power.

In the case of *Morris, et al.* v. *Roseman,* et al., 162 Ohio St., 447, Justice Zimmerman said at page 450 of that decision:

> "But how and in what manner is such power to be exercised?
>
> "The Constitution of Ohio provides two ways. By Section 2, Article XVIII, a mandatory duty is placed upon the General Assembly to enact laws for the incorporation and government of cities and villages, and Section 7, Article XVIII, grants a municipality the option of determining its own plan of local self-government by framing and adopting a charter. If a municipality adopts a charter it thereby and thereunder has the power to enact and enforce ordinances relating to local affairs, but, if it does not, its organization and operation are regulated by the statutory provisions covering the subject.
>
> "In other words, by Sections 3 and 7 of Article XVIII of the Constitution, a municipality has the power to govern itself locally in certain respects. The statutes in no way inhibit such power but merely prescribe an orderly method for the exercise of such power where the municipality has not adopted a charter and set up its own governmental machinery thereunder."

Of prime importance in this passage are the expressions "its organization and operation" and "an orderly method for the exercise of such power." Both these expressions clearly relate to the structural organization, or the *form* of government of the municipality, and this language is in complete harmony with the view expressed in the *Perrysburg* case, *supra,* on the essential difference between charter and non-charter municipal corporations, and the application to them of enactments of the General Assembly.

In *Perrysburg* it was held:

> "* * *
>
> "5. 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. (State, ex rel. City of Toledo, v. Lynch, Auditor, 88 Ohio St., 71, 102 N.E., 670, 48 L.R.A. (N.S.), 720, Ann. Cas., 1914D, 949, disapproved upon the proposition that a charter is a prerequisite to the exercise of home-rule powers under Section 3, Article XVIII.)
>
> "* * *"

The "distribution of the powers," thus mentioned also quite plainly refers to the *form* of municipal government, and where that form is not prescribed by charter the state enactments which establish a statutory form are fully applicable. This was the conclusion reached in Opinion No. 4322, Opinions of the Attorney General for 1954, pages 498 and 499, where it was held:

> "1. The powers of local self-government within constitutional limitations are conferred alike, under the provisions of Section 3, Article XVIII, Ohio Constitution, on all municipal corporations whether or not such corporations have adopted a charter as provided in Section 7, Article XVIII, Ohio Constitution.
>
> "2. The adoption of a charter is a means whereby a municipal corporation may provide for a delegation or distribution of the powers of local self-government, so conferred on the municipal corporation itself, among the several officers and branches, including the municipal legislative authority, of the governmental structure thereby established; and such distribution to such officers and branches may be at variance with the powers enjoyed by such officers and branches in the case of a municipal corporation which has elected, by its failure to adopt a charter, to operate under a statutory form of municipal government.
>
> "3. Statutory provisions fixing the salaries of municipal officers and employes, or prescribing limits within which changes in such salaries may be made, relate to the form or structure of the several statutory plans of municipal government for which the General Assembly has made provision by law as authorized by Section 2, Article XVIII, Ohio Constitution. Immunity from such limiting provisions may be achieved by municipal corporations by the adoption of a charter establishing a form or structure of municipal government at variance with such statutory plans; but such limiting provisions apply to municipal corporations which have elected, by failure to adopt a charter, to operate under a statutory plan of municipal government.
>
> "* * *"

What, then, is the statutory provision which prescribes the form of a city government so far as the police and fire departments are concerned?

Section 737.05, Revised Code, provides in part:

> "The police department of each city shall be composed of a chief of police and such other officers, patrolmen, and employees as the legislative authority thereof provides by ordinance.
>
> "* * *"

Section 737.06, Revised Code, provides:

> "The chief of police shall have exclusive control of the stationing and transfer of all patrolmen and other officers and employees in the police department, under such general rules and regulations as the director of public safety prescribes."

Section 737.08, Revised Code, provides in part:

> "The fire department of each city shall be composed of a chief of the fire department and such other officers, firemen, and employees as provided by ordinance. * * *"

Section 737.09, Revised Code, provides:

> "The chief of the fire department shall have exclusive control of the stationing and transferring of all firemen and other officers and employees in the department, under such general rules and regulations as the director of public safety prescribes."

These sections indicate that two separate departments, police and fire, were contemplated by the legislature. The fact that the chief of each department has the exclusive control of the stationing and transfer of men under him is further evidence of the separation of the two departments.

Section 737.11, Revised Code, provides as follows:

> "The police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority thereof, and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire. Both the police and fire departments shall perform such other duties as are provided by ordinance. *The police and fire departments in every city shall be maintained under the civil service system.*" (Emphasis added)

Section 143.33, Revised Code, which deals with examinations for municipal police and fire departments, reads as follows:

> "Separate examinations shall be given and separate eligibility lists maintained by municipal civil service commissions for original appointments to and promotions in fire and police departments in cities. No person may be transferred from one list to the other. Appointments and promotions in said departments shall be only from the separate eligible lists maintained for each of said departments. *Transfers of personnel from one department to the other are hereby prohibited.*" (Emphasis added)

From these provisions it is clear that the legislature intended a separate police and fire department, therefore, a "non-charter" city lacks authority to merge the police department and fire department into a single unit.

Your second question seems to be merely another aspect of your first question relative to merger of the two departments. Clearly, if the police officers can be compelled by ordinance to "double in brass" by providing fire protection services as well as police services there will be a merger in fact as well as in name.

A municipal corporation may provide fire protection for its inhabitants in either of two ways. It may establish a fire department as provided in Section 715.05. Revised Code, or it may contract for such service as provided in Section 717.02, Revised Code. If it elects to establish a municipal fire department then the provisions of Sections 737.08, 737.09 and 737.11, Revised Code, as to the control of the department and the scope of its operations apply. The language of Section 737.11, Revised Code, clearly indicates that the police department and the fire departments are given functions which are distinctly different, and it is plainly implied that neither is primarily responsible for the function for which the other is primarily responsible. Cooperation between the two departments is, of course, necessarily implied. Indeed, the preservation of the peace, etc., by police officers at the scene of a fire, police aid to the expeditious movement of fire equipment to the scene of a fire, and the like, are essential to the operation of a fire department, but such aid and assistance is essentially a police duty performed by police officers.

It is noted that both departments "shall perform such other duties as are provided by ordinance" but I consider this ineffective to permit by ordinance the assignment of police officers to duties of fire protection other than such as are incidental to and a part of the functions of the police department.

In the case at hand you indicate that the city has the assistance of a private volunteer group, and this is presumably pursuant to a contract with a private fire company as authorized in Section 717.02, Revised Code. I do not consider that this changes the matter in any essential way. It is true that the language of Section 737.11, Revised Code, contemplates the existence of both a police and a fire department, which situation does not here obtain, for the contracting private fire company mentioned in Section 717.02, Revised Code, is not, strictly speaking, a fire "department." Nevertheless, it seems clear to me that where a city elects to obtain fire protection by contract rather than by establishment of a fire department such contract must embrace the entire function of a city fire department,

and that function cannot be split up between such contractor and the city police department except, of course, that the latter department may be required to provide the police protection which is peculiarly required at the scene of a fire and to expedite the movement of fire equipment.

The conclusions thus reached as to your first two questions make it unnecessary to consider the remaining questions presented in your inquiry.

Accordingly, it is my opinion and you are advised that a non-charter city is without authority, under the constitution and laws of Ohio, to merge the police and fire departments into a common unit performing the duties of both, and such departments are subject to the provisions of Sections 737.05 to 737.09, inclusive, Revised Code; nor can a practical merger of such departments be accomplished by indirection by failing to establish a fire department and by assigning purely fire protection duties to members of the police department.

Respectfully,
MARK MCELROY
Attorney General